

NO. 08-23-00017-CV

IN THE COURT OF APPEALS
FOR THE EIGHTH JUDICIAL DISTRICT
EL PASO, TEXAS

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ELIZABETH G. FLORES
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WHATABURGER RESTAURANTS LLC,
Appellant,

V.

ROSA ELIA FUENTES,
Appellee

From the District Court of Bexar County
57th Judicial District of Texas
No. 2022-CI-11371

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ORAL ARGUMENT CONDITIONALLY REQUESTED

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STATEMENT OF THE CASE

This case concerns the application of the Texas Citizens Participation Act to allegations of calling the police and advising that the police are on the way. Appellee, Plaintiff in the underlying suit, filed suit in the 57th Judicial District Court of Bexar County, Texas in the case of *Rosa Ella Fuentes v. Selena Michell Acevedo and Whataburger Restaurants, LLC*, Cause No. 2022CI11371. CR5. (Appendix 1) Appellant Whataburger Restaurants LLC filed a “Motion to Dismiss Property Claim” pursuant to the Texas Citizens Participation Act.” CR87. The hearing on Whataburger’s Motion to Dismiss was conducted on November 3rd, 2022 by the Honorable Judge Nicole Garza. RR1. The Honorable Judge did not rule or enter an order granting or denying Whataburger’s Motion. Therefore, Whataburger’s Motion was overruled by operation of law on December 3, 2022. Tex. Civ. Prac. & Rem Code § 27.008(a). Pursuant to Texas Civil Practice and Remedies Code §51.014(a)(12), Whataburger timely filed a Notice of Accelerated Appeal on December 9th, 2022. CR137.

STATEMENT REGARDING ORAL ARGUMENT

The issues before the Court are not fact intensive and can be resolved by a plain language interpretation of a statute. Therefore, Whataburger does not believe oral argument is necessary. However, in the event the Plaintiff requests and is granted oral argument, Whataburger requests to also appear and argue.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction over this interlocutory appeal.¹ The Texas Civil Practices and Remedies Code permits an interlocutory appeal of the denial of a motion to dismiss brought pursuant to Chapter 27.003. Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(12). A motion to dismiss pursuant to Chapter § 27.003 must be ruled upon no later than the 30th day from the date of the hearing. Tex. Civ. Prac. & Rem Code § 27.005. If the Court does not rule within 30 days, the motion is deemed overruled by operation of law. Tex. Civ. Prac. & Rem Code Ann. § 27.008(a).

Whataburger filed its Motion to Dismiss on October 10, 2022. CR87. The trial court heard the motion on November 3, 2022. CR101, RR1.

¹ Whataburger does not believe that the Court's jurisdiction is in dispute. This statement is being offered prophylactically based on an inquiry from the transferring Court regarding its jurisdiction over the appeal. Whataburger provided the basis of its jurisdiction in a letter response on January 11, 2023. Whataburger believes by the continued pendency of this appeal that the response fully satisfied the inquiry.

Therefore, the deadline for the trial court to grant or deny Whataburger's motion was December 3, 2022. Tex. Civ. Prac. & Rem Code § 27.005. Since the trial court did not grant or deny Whataburger's motion by that date, Whataburger's Motion to Dismiss pursuant to Chapter 27 was deemed overruled by operation of law. Tex. Civ. Prac. & Rem Code § 27.008(a).

The Texas Supreme Court has instructed that when a Motion to Dismiss pursuant to Chapter 27 is overruled by operation of law, the moving party is entitled to an interlocutory appeal of the denial pursuant to Section 51.014 of the Civil Practice and Remedies Code. *In re Panchakarla*, 602 S.W.3d 536, 541 (Tex. 2020) (“whether it was overruled by operation of law on vacatur of the prior order, the defendants can seek relief by interlocutory appeal as the Legislature contemplated.”). Likewise, the Fourth Court of Appeals, the transfer Court in this case, has previously recognized that a TCPA Motion to Dismiss was denied by operation of law where there is no order in the record. *KB Home Lone Star Inc. v. Gordon*, 629 S.W.3d 649,653 (Tex.App.—San Antonio 2021) (“The record does not contain an order on either the TCPA motion or the Gordons’ motion for sanctions”), *see also Simmons v. Taylor*, 651 S.W.3d

499, 503 (Tex. App.—Houston [14th Dist.] 2022, no pet.). This Court’s jurisdiction has been established.

ISSUES PRESENTED

1. Are communications to and about the police about alleged criminal activity or reckless driving matters of public concern?
2. Are interactions with the police protected as the right to petition as that term is defined by the TCPA?
3. Can a party shield its actions from the TCPA by including an exempt claim in its pleadings that also contain non-exempt claims?
4. Can a party present clear and specific evidence establishing a prima facie case for each essential element of their claims if they don’t present any evidence at all?
5. Does the Texas Supreme Court recognize claims of inadequate security separate from existing premises liability claims?
6. Does calling the police create a dangerous condition?
7. Did the trial court err in denying Whataburger’s Motion to Dismiss pursuant to the Texas Citizens Participation Act?

STATEMENT OF FACTS

Plaintiff asked Whataburger to call the police. CR6. Plaintiff sued Whataburger for complying with her request and for communicating that the police had been called. CR8. Whataburger sought protection under the Texas Citizens Participation Act because communications about public safety, alleged crimes and law enforcement activities are all protected activities. CR87. The trial court did not issue a ruling within 30 days, thus overruling Whataburger's motion by operation of law.

A. Plaintiff sued Whataburger for calling the police and advising that police had been called.

Plaintiff alleges Selena Michelle Acevedo hit the back of her car, twice, while they were in the drive-through lane at Whataburger. CR5. According to her pleadings, Plaintiff requested that a Whataburger employee call the police. CR6. When Ms. Acevedo reached the drive-through window, an employee advised that the police had been called. CR6. Plaintiff alleges that Acevedo subsequently drove to where Plaintiff was parked, and a physical altercation ensued. CR6.

Plaintiff brought suit against both Ms. Acevedo and Whataburger. CR5. Plaintiff's claims against Ms. Acevedo are for negligence and assault. CR7. Plaintiff's claims against Whataburger are couched in

terms of negligent security and premises liability. CR7. Plaintiff's Original Petition states in relevant part:

“As Defendant, SELENA MICHELLE ACEVEDO, drove up to the drive-thru window after the Plaintiff, an employee of Whataburger advised that police officers were called to the scene by Plaintiff, ROSA ELIA FUENTES.” CR6.

Plaintiff alleges negligence by Whataburger for the following:

“In failing to warn Plaintiff of a potentially dangerous situation that could occur after an employee told Defendant, SELENA MICHELLE ACEVEDO, that the police were called to the scene.” CR8.

“In creating a dangerous condition that the Defendant had actual knowledge of.” CR8.

B. Whataburger moved to dismiss Plaintiff's property claims because communications with or about a police report are protected under the TCPA.

Whataburger moved to dismiss Plaintiff's property claims pursuant to Chapter 27 of the Texas Civil Practices and Remedies Code. CR87. Whataburger's motion established that the alleged communications were protected activity under the Texas Citizen Participation Act. CR90-91. Whataburger further set forth why Plaintiff could not establish her claims of premises liability or negligent security by clear and specific evidence as a matter of law or fact. CR93-95.

C. Plaintiff failed to attach any evidence to her TCPA response.

Plaintiff did not attach any evidence to her response. Instead, she relied on her argument that claims were exempt from the TCPA and that her claim had nothing to do with Whataburger's call to the police. CR107-111. However, Plaintiff did not amend her pleadings to align with her argument.

D. Plaintiff argued that Whataburger should not have told anyone that the police were on the way.

Contrary to her written response, during hearing, Plaintiff admitted her claims were based on or in response to Whataburger's communications with or about law enforcement:

The facts are that they went ahead and told – in fact, I think they even went against the TCPA **by telling the defendant, hey, we called the police. That, to me, created a duty, or a higher duty to at least inform my client that something, hey, we told him or her.** RR12. (Appendix 2)

And again, I emphasize to the court we're not reciting – we're not – our lawsuit is not based on the TCPA. And, in fact, if they wanted to make – I don't know if there's any case law that says, first of all, it's there to protect the public. Well, they didn't protect my client. **It's there to protect for them not to tell somebody else what they're doing. Whataburger should not have told anyone.** And that's one of the primary reasons and purposes of the statute. And that's all I have to say, Your Honor. RR16.

E. Whataburger's motion was overruled by operation of law.

The hearing on Whataburger's Motion to Dismiss was held on November 3, 2022. CR157, RR1. The trial court did not issue a ruling on

Whataburger's motion within 30 days. CR157. Whataburger filed its Notice of Appeal on December 9, 2022. CR137. The trial court did not enter an order granting or denying Whataburger's motion.

SUMMARY OF THE ARGUMENT

A Samaritan should never have to fear being sued for telling someone the police are on their way. Here, Whataburger is being sued for calling the police to report an incident and advising the involved parties that the police were on the way. Any claim that Whataburger was negligent for such actions leads to extremely dangerous precedent.

Fortunately, the Texas Citizens Participation Act protects communications about public safety, alleged crimes, and law enforcement activities. Under the Act, a suit based on such protected activities is subject to immediate dismissal unless the Plaintiff can present clear and specific evidence establishing a prima facie case for each essential element of their claims.

Plaintiff failed to submit a single piece of evidence to establish her claims. Instead, Plaintiff's response rested on the argument that she was not suing Whataburger for its communications with or about the police.

However, in contrast to her argument, Plaintiff's pleadings clearly establish that her allegations are, in fact, based on or in response to

Whataburger's communication that it had called the police. Plaintiff also admitted that her suit was based on the premise that "Whataburger should not have told anyone" that it called the police and that it created a "higher duty."

In light of the burden shifting analysis of the TCPA, the Court need go no further in finding reversible error. The application of the TCPA was established by Plaintiff's own pleadings, and Plaintiff presented no evidence to establish a prima face case of each element of her claims. Whataburger was entitled to dismissal.

Even if Plaintiff had met her burden, however, Whataburger would still be entitled to dismissal. Plaintiff's claims against Whataburger are for negligent security and premises liability. However, the Texas Supreme Court has confirmed that a claim of negligent security is nothing more than a premises liability claim.

As for Plaintiff's premises liability claim, Plaintiff cannot establish that Whataburger breached any recognized duty by calling the police and advising that the police had been called. In fact, even in those cases where it is foreseeable to a business owner that a crime is about to occur (factors

not present in this case) a business owner can ameliorate the danger by calling the police.

Plaintiff correctly argued that most people involved in motor vehicle accidents stay in their vehicles until the police arrive. It was not foreseeable to Whataburger that anything different would have happened on the evening of the alleged incident. However, even if there was concern, Whataburger called the police and advised that the police had been called.

Whataburger's actions were not negligent under any theory. Plaintiff's claims cannot be established. Whataburger was entitled to expedited dismissal under the TCPA.

ARGUMENT AND AUTHORITIES

A. The Texas Citizens Participation Act.

Chapter 27 of the Texas Civil Practice and Remedies Code is the Texas Citizens Participation Act, which is an anti-SLAPP statute. *See In re Lipsky*, 460 S.W.3d 579, 586 (Tex. 2015). The purpose of the Act is “to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury.”

Greer v. Abraham, 489 S.W.3d 440, 442 (Tex. 2016); Tex. Civ. Prac. & Rem. Code § 27.002. The Texas legislature has commanded that the TCPA “shall be construed liberally to effectuate its purpose and intent fully.” *Mohamed v Ctr. for Sec. Policy*, No. 05-17-00278-CV, 2018 WL 3372921, at *2 (Tex. App.—Dallas July 11, 2018, no pet. h.) (quoting Tex. Civ. Prac. & Rem. Code § 27.011(b)); *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 898 (Tex. 2017).

Importantly, “[t]he TCPA casts a wide net.” *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018). The Act allows a litigant to seek dismissal of a “legal action” that is “based on or is in response to a party’s exercise of the right of free speech, right to petition, or right of association.” Tex. Civ. Prac. & Rem. Code § 27.003. The statute’s expedited procedures, which include an automatic discovery stay and the availability of interlocutory appeal, permit courts to dismiss claims before judicial resources go to waste and unnecessary attorney’s fees mount. *Id.* §§ 27.003(c) (automatic discovery stay), 27.008 (interlocutory appeal).

B. The Burdens of Proof and Standard of Review.

The Act calls for a three-step burden shifting analysis. The movant bears the initial burden to demonstrate “that the legal action is based on or is in response to the party’s exercise of . . . the right to petition.” Tex. Civ. Prac. & Rem Code § 27.005(b). *Yu v. Koo*, 633 S.W.3d 712, 720 (Tex. App.—El Paso 2021, no pet.). The Act then shifts the burden to the non-movant, allowing the non-movant to avoid dismissal by establishing by clear and specific evidence a prima facie case for each essential element of the claim in question *Yu v. Koo*, 633 S.W.3d at 720, Tex. Civ. Prac. & Rem Code §§ 27.005(c), 27.010. Even if the non-movant establishes a prima facie case, “the third step still requires dismissal if the movant demonstrates by a preponderance of evidence each essential element of a valid defense to the nonmovant's claim.” *Yu v. Koo*, 633 S.W.3d at 720, citing Tex. Civ. Prac. & Rem. Code Ann. § 27.005(d). In other words, the third step of the three-step analysis gives the movant an opportunity, and the burden, to rebut any prima facie case built by the non-movant.

On appeal, the question of whether the parties satisfied their respective burdens is subject to a de novo standard of review. *Dallas Morning News, Inc. v. Hall*, 579 S.W.3d 370, 377 (Tex. 2019); *Yu v. Koo*,

633 S.W.3d at 720. Likewise, questions of statutory construction are reviewed de novo. *State ex rel. Best v. Harper*, 562 S.W.3d 1, 11 (Tex. 2018).

C. The question of whether or not a claim is subject to the TCPA is determined by the pleadings.

Under the TCPA, a defendant moving for dismissal need show only that the plaintiff's legal action is based on or is in response to the exercise of the right of free speech or the right to petition. Tex. Civ. Prac. & Rem Code § 27.005. This determination is made by the parties' pleadings and not by any parties' characterization of the pleadings. *Hersh v. Tatum*, 526 S.W.3d 462, 467 (Tex. 2017) ("the plaintiff's petition ..., as so often has been said, is the 'best and all-sufficient evidence of the nature of the action.'"); *Pacheco v. Rodriguez*, 600 S.W.3d 401, 408 (Tex. App.—El Paso 2020, no pet.) (this determination is made by reviewing the allegations as set forth in their pleadings themselves).

D. Plaintiff's suit is a legal action.

There is no dispute that Plaintiff's suit constitutes a legal action. The TCPA defines a "legal action" as a lawsuit, cause of action, petition, complaint, cross claim or counterclaim, or any other judicial pleading or filing that requests legal, declaratory, or equitable relief. Tex. Civ. Prac.

& Rem. Code § 27.001(6). Therefore, by definition, a complaint is a “legal action.”

E. Plaintiff’s suit was filed in response to Whataburger’s exercise of the right to free speech.

“Whether a claim is based on or in response to a party’s exercise of the right of free speech requires analysis of two components: (1) whether the party makes a communication; and (2) whether such communication is made in connection with a matter of public concern.” *Yu v. Koo*, 633 S.W.3d at 721, *citing* Tex. Civ. Prac. & Rem. Code Ann. § 27.001(3).

1. Whataburger’s Actions Constituted a Communication.

“A “communication” under the TCPA is “the making or submitting of a statement or document in any form or medium, including oral, visual, written, audiovisual, or electronic.” Tex. Civ. Prac.& Rem. Code Ann § 27.001(1). Case law defines “communication” under the TCPA as very broad, encompassing “[a]lmost every imaginable form of communication, in any medium[.]” *Yu v. Koo*, 633 S.W.3d at 721 *citing* *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 894 (Tex. 2018).

Plaintiff’s complaint against Whataburger is predicated on Whataburger’s acts of calling the police and communicating that the police had been called. CR6, 8. Specifically, Plaintiff argued,

“Whataburger should not have told anyone.” RR16. Advising or telling are forms of communication. *Yu v. Koo*, 633 S.W.3d at 722 (a statement is a communication). Plaintiff’s claims are therefore based on or in response to communications made by Whataburger as the term is defined under the TCPA. Tex. Civ. Prac. & Rem. Code Ann. § 27.001(1).

2. Whataburger’s Communications Pertained to a Matter of Public Concern.

The TCPA defines a matter of public concern as “a statement or activity regarding: (A) health or safety (B) a matter of political, social, or other interest to the community; or (C) a subject of concern to the public.” Tex. Civ. Prac.& Rem. Code Ann. § 27.001(7); *Aaron Whitelock & Donna Whitelock, Appellants, V. Jennifer Stewart, Donald Stewart, Steven Stewart, & Kathy Stewart, & D/B/A Royal Horse Farms, Appellees.*, No. 08-21-00185-CV, 2023 WL 1824192, at *6 (Tex. App.—El Paso Feb. 8, 2023, no pet. h.). Criminal acts and reckless driving are both matters of public concern.

It is well-settled that criminal acts are matters of public concern under the TCPA. *See, e.g., Page v. Bakewell*, No. 05-21-00905-CV, 2022 WL 4007879, at *4 (Tex. App.—Dallas Sept. 2, 2022, no pet.) (mem. op.) (allegations person engaged in and admitted to engaging in criminal

activity were communications made in connection with a matter of public concern); *CBS Stations Grp. of Tex., LLC v. Burns*, No. 05-21-00042-CV, 2021 WL 4398031, at *3 (Tex. App.—Dallas Sept. 27, 2021, no pet.) (mem. op.) (news broadcast involving robbery, high-speed chase, and arrest of suspect were matters of public concern).

Reckless driving also constitutes an act clearly dangerous to human life. *See Matter of R.C.*, 626 S.W.3d 76, 87 (Tex. App.—Houston [14th Dist.] 2021, no pet.); Tex. Transp. Code Ann. § 545.401(b). Therefore, communications regarding alleged reckless driving (or vehicular assault) in a public location and reports of police involvement regarding such incident are matters of health and safety or other interests of concern to the community or public. *Austin v. Amundson*, No. 05-22-00066-CV, 2022 WL 16945911, at *3 (Tex. App.—Dallas Nov. 15, 2022, no pet. h.)(communications regarding alleged reckless driving and reporting of driving were matters of public concern).

As matters of public concern, communications regarding the reporting of reckless driving or crime are protected free speech. *Brady v. Klentzman*, 515 S.W.3d 878, 884 (Tex. 2017); *Yu v. Koo*, 633 S.W.3d at 722 (statements concerning alleged sexual assault or reporting of it to the

police are based on exercise of free speech); *MediaOne, L.L.C. v. Henderson*, 592 S.W.3d 933, 940 (Tex. App.—Tyler 2019, pet. denied) (holding that publication reporting criminal activity held to be of public concern); *Aaron Whitelock & Donna Whitelock, Appellants, v. Jennifer Stewart, Donald Stewart, Steven Stewart, & Kathy Stewart, & D/B/A Royal Horse Farms, Appellees*, No. 08-21-00185-CV, 2023 WL 1824192, at *6.(accusing someone of being under criminal investigation for such an offense is a matter of public concern under the TCPA).

Plaintiff alleged she was struck twice by Ms. Acevedo's vehicle. This is an allegation of either reckless driving or assault. Tex. Pen. Code Ann. § 22.01; *Tyra v. State*, 897 S.W.2d 796, 798–99 (Tex.Crim.App.1995); *Butler v. State*, 928 S.W.2d 286, 288 (Tex. App.—Fort Worth 1996, pet. ref'd). Regardless of how the incident was classified, an incident in a public place requiring dispatch of police is a subject of concern to the public. Indeed, the advisory by Whataburger that officers had been called was clearly a communication intended to further public safety. Thus, Plaintiff's claims are based on or in response to Whataburger's exercise of its right of free speech pertaining to a matter of public concern under the TCPA.

F. Plaintiff's suit was filed in response to Whataburger's exercise of the right to petition.

Whataburger's actions are also protected as a right to petition. Whether a claim is based on or in response to a party's exercise of the right to petition requires a determination of: (1) whether the party makes a communication; and (2) whether such communication is made in or pertaining to, a judicial proceeding, "an official proceeding, other than a judicial proceeding, to administer the law;" or "an executive or other proceeding before a department of the state or federal government or a subdivision of the state or federal government[.]" Tex.Civ.Prac. & Rem.Code Ann. § 27.001(4)(A).

When a person interacts with the police to report perceived wrongdoing, that person is exercising their right to petition, as that right is defined in the TCPA. *Buckingham Senior Living Cmty., Inc. v. Washington*, 605 S.W.3d 800, 807 (Tex. App.—Houston [1st Dist.] 2020, no pet.). Whataburger's communication that the police had been summoned bears a direct relationship to the reporting of an alleged crime. *See for example, Yu v. Koo*, 633 S.W.3d at 724 (concluding that communications about statements to the police implicate the right of free

speech and the right to petition); *Saks & Co., LLC v. Li*, No. 14-21-00085-CV, 2022 WL 3970863, at *6 (Tex. App.—Houston [14th Dist.] Sept. 1, 2022, no pet. h.) (“statements to police and others about Li’s alleged theft from Saks were communications pertaining to an official proceeding to administer the law”); *Bibby v. Bibby*, 634 S.W.3d 401 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (A person exercises her right to petition under the Texas Citizens Participation Act (TCPA) when she interacts with the police to report perceived wrongdoing). Therefore, Whataburger’s actions were also protected as a right to petition as defined by the TCPA.

G. Plaintiff did not shield her entire case from the TCPA by including a claim subject to an exemption.

In an effort to evade application of the TCPA, Plaintiff argued the Act did not apply to her claims because she is seeking a claim for bodily injury, in addition to her property claims which is exempted from the statute. CR111, RR15. Plaintiff acknowledged that Whataburger’s Motion to Dismiss is directed solely at her property damage claims, and not at her personal injury claims. CR111, RR.16. However, Plaintiff argued that by virtue of her inclusion of a personal injury claim, her entire suit is protected from the TCPA. CR111, RR16.

In *KB Home Lone Star Inc. v. Gordon*, the Court rejected a contention made by the plaintiffs in that case that the presence of a DTPA legal action in a lawsuit bars an otherwise meritorious TCPA motion to dismiss a separate claim:

We are unaware of any supporting authority and therefore hold section 27.010(a)(7) exempts all claims under Chapter 17, Business & Commerce Code, other than an action governed by Section 17.49(a) of that chapter, but does not exempt any other claim, document, or filing requesting legal, declaratory, or equitable relief that might otherwise be subject to the TCPA.

629 S.W.3d 649, 657-58 (Tex. App.—San Antonio 2021, no pet.). The Court ruled that when a claim covered by an exemption is pled, it does not exempt any other claim that might be subject to the TCPA. *Id.*

The non-movant carries the burden of proving a statutory exemption. *Pacheco v. Rodriguez*, 600 S.W.3d 401, 405 (Tex. App.—El Paso 2020, no pet.) At the trial court level, Plaintiff relied on *Cavin v. Abbott*, 545 S.W.3d 47, 57 (Tex. App.—Austin 2017, no pet.) and *Union Pac. R.R. Co. v. Dorsey*, 651 S.W.3d 692, 702 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.) to argue that the assertion of an exempt claim shields all claims alleged. Neither case supports Plaintiff's argument.

In *Cavin v. Abbott*, the Court ruled that a claim for assault was claim for bodily injury which was exempted by the statute. 545 S.W.3d 47, 57 (Tex. App.—Austin 2017, no pet.). *Cavin* has no application to the issue before the Court. Whataburger does not seek to dismiss Plaintiff’s bodily injury claim, and a claim for property damage does not commonly denote any “[p]hysical damage to a person’s body.” *Id.*

Union Pac. R.R. Co. v. Dorsey supports Whataburger’s position on this matter. In *Dorsey*, the court squarely rejected the identical argument made by Plaintiff – that the presence of bodily injury claims exempts all other claims from the TCPA. 651 S.W.3d 692, 702 (Tex. App.—Houston [14th Dist.] 2022, no pet. h.) The Court in *Dorsey* held that dismissal under the TCPA is determined not by the action as a whole, but on a claim-by-claim basis. *Id.*, see also, *Entravision Commc’ns Corp. v. Salinas*, 487 S.W.3d 276, 281 (Tex. App.—Corpus Christi–Edinburg 2016, pet. denied).

Whataburger moved to dismiss Plaintiff’s property claims only. Property claims are not exempted from the TCPA. Plaintiff’s property claims were therefore subject to dismissal.

H. Plaintiff did not establish a prima facie case of negligent security or premises liability against Whataburger.

Having established that the TCPA applies to Plaintiff's claims for property damage, the burden shifted to Plaintiff to present clear and specific *evidence* establishing a prima facie case for each essential element of the claims implicated under the TCPA. Tex. Civ. Prac. & Rem. Code § 27.005(c). A prima facie case requires evidence sufficient as a matter of law to establish a given fact if it is not rebutted or contradicted. *KB Home Lone Star Inc. v. Gordon*, 629 S.W.3d at 658. This evidentiary burden requires something beyond allegations of a rational inference. *Buzbee v. Clear Channel Outdoor*, 616 S.W.3d 14, 29 (Tex. App.—Houston [14th Dist.] 2020, no pet.); see also *Gensetix, Inc. v. Baylor Coll. of Med.*, 616 S.W.3d 630, 644 (Tex. App.—Houston [14th Dist.] 2020, pet. dismiss'd) (plurality op.). Accordingly, a non-movant cannot rely solely on pleadings to establish a prima facie case. *Buzbee*, 616 S.W.3d at 29; *Moore v. Reed*, No. 14-20-00463-CV, 2022 WL 1180116, at *2 (Tex. App.—Houston [14th Dist.] Apr. 21, 2022, no pet.)

Plaintiff did not attach any evidence in her response to Whataburger's Motion to Dismiss. Her characterizations of her pleadings, even if accurate, do not constitute clear and specific evidence

of a claim. *Buzbee v. Clear Channel Outdoor*, 616 S.W.3d at 29; *see also Gensetix, Inc. v. Baylor Coll. of Med.*, 616 S.W.3d at 644. Consequently, Whataburger was entitled to dismissal of all claims by Plaintiffs covered by the TCPA as a matter of law.

I. There is no cause of action for negligent security.

Even if Plaintiff had attached evidence to her response, she could not have established a claim for negligent security as a matter of law. The Texas Supreme Court has repeatedly admonished that claims of inadequate security are purely premises-liability cases. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010); *see also Timberwalk Apartments*, 972 S.W.2d at 753 (holding, in inadequate security case, that jury was properly charged under premises-liability theory rather than negligent-activity theory); *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 655 & n. 3 (Tex.1999) (plurality opinion) (discussing, in inadequate security case, prior “premises liability cases” and noting that Court's analysis “is complementary, not contradictory, to the traditional premises liability categories”); *id.* at 661 (Enoch, J., concurring) (“Thus, we are left with the traditional premises liability classifications to determine Mellon’s duty.”). Therefore, Plaintiff’s claim

of negligent security was nothing more than a reiteration of her premises liability claim and did not provide a separate avenue for recovery.

J. Plaintiff did not and cannot establish a cause of action for premises liability.

As with her negligent security claim, Plaintiff failed to present any evidence whatsoever, much less clear and specific evidence, to support her premises liability claim. Even if she had, she could not have met her burden.

In a premises-liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010). Whether a duty exists turns “on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.” *Id.* The nature and character of the premises can also be a factor that makes criminal activity more foreseeable. *Id.* at 768.

In rare cases, criminal misconduct is foreseeable because of immediately preceding conduct. *Id.* However, since the landowner “is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third

person are occurring, or are about to occur.” *Id.* Therefore, when a property owner “by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, ... [the owner] has a duty to take precautions against it.” *Id.*

In *Del Lago Partners, Inc. v. Smith*, the court found that a bar owner had a duty to protect patrons based on the fact 1) it was serving alcohol, 2) had observed an hour and a half of verbal and physical hostility in the bar, and 3) continued to serve drunk rivals who were engaged in repeated and aggressive confrontations. *Id.* at 769. Under such extreme circumstances, the Court found that the bar should have taken some action, while pointedly observing that *the presence of uniformed officers at a bar can usually deter a fight. Id.*

Plaintiff has not identified any evidence that the acts immediately preceding the incident constituted sufficient notice that criminal conduct was imminent. A Whataburger drive through is not a dangerous place, and the incident was entirely unrelated to the services provided by Whataburger. The incident was also unrelated to anything particular about Whataburger’s premises. Whataburger employees did not observe

anything, but merely reacted to a request to call the police so that a report could be made. It is undisputed that Whataburger immediately called the police. Indeed, as Plaintiff argued in her response that “[m]ost people involved in motor vehicle accidents stay in their vehicles until the police arrive.” CR108.

However, even if Whataburger could have foreseen Acevedo’s actions, it took the exact steps espoused by the Court in *Del Largo* to respond to the situation. Specifically, in *Del Lago*, the Court advised if a duty arose, it was to diffuse the situation by taking steps such as calling for security. *Id.* at 771–72. Thus, even if had any reason to believe that a dangerous situation was about to transpire, it satisfied its duty by calling for the police. *Id.*, at 774-75. Plaintiff has not and cannot establish a prima facie case (with clear and specific evidence or otherwise) of her claim for premise liability.

K. Conclusion.

The TCPA protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them. These protections shield communications concerning a report made to the police. Plaintiff’s Original Petition seeks recovery of property

damage from Whataburger because it: (1) made a report to law enforcement; and (2) told a suspect that the police had been called. These communications are expressly protected by the TCPA.

The burden shifted to Plaintiff to produce clear and specific evidence of her claims. Plaintiff did not even attempt to meet this burden. Whataburger was entitled to judgment as a matter of law, and Plaintiff's property claims should have been dismissed pursuant to the protections of the TCPA. Whataburger respectfully requests that this Court correct the error of the trial court below.

PRAYER

For all the reasons stated herein, the TCPA required the dismissal of Plaintiff's property claims. *See* Tex. Civ. Prac. & Rem. Code §27.005(d) (mandating "[i]f the non-movant satisfies his burden, then the court must nonetheless 'dismiss a legal action against the moving party if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law.'"). Whataburger therefore respectfully request that this Court reverse the trial court's order denying its Motion to Dismiss, render judgment in Whataburger's favor on Whataburger's Motion to Dismiss, award to Whataburger the court costs and attorneys' fees they were forced to

expend in this appeal, remand this matter to the trial court to determine the amount of court costs and attorneys' fees that must be awarded to Whataburger in connection with their Motion to Dismiss, and any other relief to which Whataburger is justly entitled in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14th day of February 2023 a true and correct copy of the foregoing Brief of Appellant was served on the following counsel of record by electronic service through *eFile.TXCourts.gov*; and the Brief of Appellant was duly filed with the Clerk of the Fourth Court of Appeals through *eFile.TXCourts.gov*, together with this proof of service:

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CERTIFICATE OF COMPLIANCE

Pursuant to Tex. R. App. P. 9.4(i)(3), the undersigned certifies this Brief complies with the type-volume limitations of Tex. R. App. P. 9.4(i)(2)(B).

1. Exclusive of the exempted portions in Tex. R. App. P. 9.4(i)(2)(B), the Brief contains 5,555 words.
2. The Brief has been prepared in proportionally spaced typeface using Word for Microsoft 365 Version 2212.
3. If the Court so requests, the undersigned will provide an electronic version of the Brief and/or a copy of the word or line printout.
4. The undersigned understands a material misrepresentation in completing this Certificate, or circumvention of the type volume limits in Tex. R. App. P. 9.4, may result in the Court's striking the Brief and imposing sanctions against the person signing the Brief.

/s/ Karen L. Landinger
KAREN L. LANDINGER

NO. 04-22-00828-CV
IN THE COURT OF APPEALS
FOR THE FOURTH JUDICIAL DISTRICT
SAN ANTONIO, TEXAS

WHATABURGER RESTAURANTS LLC,
Appellant,

V.

ROSA ELIA FUENTES,
Appellee

From the District Court of Bexar County
57th Judicial District of Texas
No. 2022-CI-11371

APPENDIX

1. Plaintiff's Original Petition CR.5.
2. Reporter's Record pp. 12, 16.

CAUSE NO. 2022CI11371

ROSA ELIA FUENTES,
Plaintiff,

v.

SELENA MICHELLE ACEVEDO AND
WHATABURGER RESTAURANTS, LLC,
Defendants.

§
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§
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§
§
§

IN THE DISTRICT COURT

Bexar County - 57th District Court

____ JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION WITH DISCOVERY REQUESTS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW **ROSA ELIA FUENTES**, hereinafter referred to as "Plaintiff",
complaining of **SELENA MICHELLE ACEVEDO** and **WHATABURGER RESTAURANTS, LLC**, hereinafter sometimes referred to as "Defendants", and would respectfully show unto the Court the following:

I.
DISCOVERY CONTROL LEVEL

This case will be governed by Discovery Control Level 3.

II.
PARTIES

Plaintiff resides in Starr County, Texas.

Defendant, **SELENA MICHELLE ACEVEDO**, is an individual who resides in Starr County, Texas, and may be served with process by serving her at her residence located at: 600 N. Fairgrounds Road, #12, Rio Grande City, Texas 78582 or wherever found.

Defendant, **WHATABURGER RESTAURANTS, LLC**, is a domestic entity corporation authorized to conduct business in the State of Texas, whose headquarters is at 300 Concord Plaza Dr., San Antonio, TX 78216, and may be served with process by and through its registered agent

for service, Corporation Service Company DBA CSC – Lawyers Incorporating Service Company, 211 E. 7th St., Suite 620, Austin, TX 78701 or wherever found.

III. **VENUE**

Venue of the above-styled cause is proper in Bexar County pursuant to the provisions of §15.001 and §15.002, of the TEX. CIV. PRAC. & REM. CODE, in that the event giving rise to the claim occurred in Texas.

IV. **FACTUAL ALLEGATIONS**

On or about May 10, 2021, Plaintiff, **ROSA ELIA FUENTES**, was an invitee in the restaurant owned, maintained, and operated by Defendant, **WHATABURGER RESTAURANTS, LLC**, located at 4143 US Highway 83 E, Rio Grande City, Texas 78582.

While upon Defendant's premises, Plaintiff, **ROSA ELIA FUENTES**, was in the drive-thru line to order food when the Defendant, **SELENA MICHELLE ACEVEDO**, struck her vehicle to the rear-end twice. After the second impact, Plaintiff, **ROSA ELIA FUENTES**, requested that an employee call security or the police to make a report. At this point, the Plaintiff drove to the front of the restaurant where she would wait for security and/or police officers to arrive. As Defendant, **SELENA MICHELLE ACEVEDO**, drove up to the drive-thru window after the Plaintiff, an employee of Whataburger advised that police officers were called to the scene by Plaintiff, **ROSA ELIA FUENTES**. Defendant, **SELENA MICHELLE ACEVEDO**, then drove to the front of the restaurant to confront the Plaintiff, where a physical altercation ensued. No security, agent, servant, and/ or employee of Whataburger stepped in to stop the altercation.

Pleading further, and in the alternative, Plaintiff invokes the doctrine of *res ipsa loquitur*.

V.

CAUSES OF ACTION AGAINST DEFENDANT
SELENA MICHELLE ACEVEDO: NEGLIGENCE

The incident in question and the resulting damages as set forth below were caused by the negligence of **SELENA MICHELLE ACEVEDO**, whereby she was negligent in the following respects:

- a. In failing to keep such proper lookout as an ordinary person of ordinary prudence would have kept under the same or similar circumstances;
- b. In driver inattention;
- c. In failing to apply brakes timely and properly;
- d. In failing to control speed; and
- e. In ramming into the Plaintiffs vehicle;

The above-described incident and resulting damages as set forth below were caused by the acts and omissions of Defendant, **SELENA MICHELLE ACEVEDO**.

V.A.

CAUSES OF ACTION AGAINST DEFENDANT
SELENA MICHELLE ACEVEDO: ASSAULT

The incident in question and the resulting damages as set forth below were caused by the assault of **SELENA MICHELLE ACEVEDO** onto the Plaintiff's body, whereby the Defendant **ACEVEDO**.

The above-described incident and resulting damages as set forth below were caused by the acts and omissions of Defendant, **SELENA MICHELLE ACEVEDO**.

VI.

CAUSES OF ACTION AGAINST DEFENDANT WHATABURGER RESTAURANTS,
LLC FOR NEGLIGENT SECURITY AND PREMISES LIABILITY

On the occasion in question, Defendant, **WHATABURGER RESTAURANTS, LLC**, its agents, servants, and employees, who were at all times acting in the course and scope of their

employment, were guilty of negligence toward the Plaintiff, a business invitee, who was legally on the premises in the following respects:

- f. In failing to keep the restaurant reasonably safe for its customers at the time of and/ or prior to the time of Plaintiff's incident;
- g. Lack of security outside or inside the restaurant;
- h. In failing to maintain the restaurant in safe conditions;
- i. In failing to warn Plaintiff of a potentially dangerous situation that could occur after an employee told Defendant, **SELENA MICHELLE ACEVEDO**, that the police were called to the scene;
- j. In failing to implement and/or maintain the most basic of security measures;
- k. In failing to properly hire, train and supervise its employees, agents, representatives, workers, managers, and staff in reference to a potentially dangerous situation that could occur;
- l. In failing to appropriately train employees, agents, representatives, workers, managers, and staff to monitor such cameras and timely report perceived dangerous activity or respond when a person requests or needs assistance;
- m. In failing to have adequate security policies and protocols;
- n. In creating a dangerous condition that the Defendant had actual knowledge of, and
- o. In failing to train employees, agents, representatives, workers, managers, and staff in basic security measures, including but not limited to the danger posed by Defendant **SELENA MICHELLE ACEVEDO**.

The above-described incident and resulting damages as set forth below were caused by the negligent acts and omissions of Defendant, **WHATABURGER RESTAURANTS, LLC**.

Further, Plaintiff, **ROSA ELIA FUENTES**, ultimately suffered serious bodily injuries proximately caused by a “dangerous condition” on the premises of which Defendant, **WHATABURGER RESTAURANTS, LLC**, knew of, or in the exercise of ordinary care, should have known existed.

VII. **DAMAGES**

As a proximate result of the Defendants’ negligence, Plaintiff has had to make a claim for the following damages:

- (a) pain and suffering in the past and future;
- (b) mental anguish in the past and future;
- (c) physical disability in the past and future;
- (d) medical expenses in the past and future; and
- (e) property damage;

Plaintiff is requesting the limits allowed by law of this Court as damages to satisfy the causes of action herewith contained. Pursuant to Rule 47, Plaintiff requests monetary relief more than \$1,000,000.

VIII. **DISCOVERY**

Pursuant to Rule 194, the Defendant named herein is requested to disclose, within thirty (30) days of service of this request, the information or material described in Rule 194.2(a)-(1).

Attached to this Original Petition you will find the following:

1. Plaintiff’s First Set of Interrogatories to Defendant **SELENA MICHELLE ACEVEDO**.
2. Plaintiff’s Request for Production to Defendant **SELENA MICHELLE ACEVEDO**.
3. Plaintiff’s Request for Admissions to Defendant **SELENA MICHELLE ACEVEDO**.

4. Plaintiff's First Set of Interrogatories to Defendant **WHATABURGER RESTAURANTS, LLC.**
5. Plaintiff's Request for Production to Defendant **WHATABURGER RESTAURANTS, LLC.**
6. Plaintiff's Request for Admissions to Defendant **WHATABURGER RESTARUANTS, LLC.**

In accordance with TRCP said discovery requests are due 30 days after Initial Disclosures are due. See certificate of service for additional language.

IX.
RULE 193.7 NOTICE

Pursuant to Rule 193.7 of the Texas Rules of Civil Procedure, Plaintiff hereby gives actual notice to Defendants' that any and all documents, photographs and experts and witnesses designated by Plaintiff, Defendants' or any other party in response to written discovery, supplemental discovery, amended discovery, and any and all depositions, may be used against the producing Defendants' at any special appearance, pretrial proceeding and/or at the trial of this matter without the necessity of authenticating the documents.

X.
SPOILIATION

Plaintiff hereby requests and demand that the Defendants' preserve and maintain all evidence pertaining to any claim or defense related to the incident made the basis of this lawsuit, or the damages resulting therefrom, including contracts, lists of donors, email, minutes of meetings, memoranda, correspondence, financial records, diagrams, maps, photographs, videotapes, audiotapes, recordings, invoices, checks, files, facsimiles, voice mail, text messages, calendar entries, log books, or information related to the reference claim. Failure to maintain such items will constitute "spoliation" of the evidence.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff, **ROSA ELIA FUENTES**, prays and requests that the Defendants, **SELENA MICHELLE ACEVEDO** and **WHATABURGER RESTAURANTS, LLC** be adjudged liable to as set forth above, and for all lawful pre-judgment and post-judgment interest, for costs of court and for such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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ATTORNEY FOR PLAINTIFF

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUME

CAUSE NO. 2022-CI-11371
COURT OF APPEALS NO. 04-22-00828-CV

ROSA ELIA FUENTES,)	IN THE DISTRICT COURT
<i>Plaintiff</i>)	
)	
)	
v.)	57TH JUDICIAL DISTRICT
)	
)	
SELENA MICHELLE ACEVEDO AND)	
WHATABURGER RESTAURANTS, LLC,)	BEXAR COUNTY, TEXAS
<i>Defendants.</i>)	

MOTION TO DISMISS

On the 3rd day of November, 2022, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Judge Nicole Garza, Judge presiding, held via Zoom teleconferencing and streaming live into the 37th District courtroom in San Antonio, Bexar County, Texas:

Proceedings reported by computerized stenotype machine;
Reporter's Record produced by Computer-Assisted
Transcription.

09:21AM 1

THE COURT: Thank you, Mr. Duran.

09:21AM 2

Mr. Garcia, a response?

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MR. GARCIA: Yes, Your Honor.

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First of all, as noted in the petition, we have never had -- have never made a claim under the TCPA.

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Because that's not our lawsuit. Our lawsuit is based on -- against Ms. Acevedo for negligence with her motor vehicle accident and her assault.

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And as to Whataburger, it's just based on negligence and premises liability. We are not making any

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claims under the TCPA, but we're not saying that it's

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based -- that Whataburger doesn't have a right to free

09:22AM13

speech.

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09:22AM15

In fact, we even stated in our response that we're not basing it on the right to free speech. We're not basing it on the right to petition. We're not basing it on the right of association.

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09:22AM19

The facts are that they went ahead and told -- in fact, I think they even went against the TCPA by telling the defendant, hey, we called the police. That, to me, created a duty, or a higher duty to at least inform my client that something, hey, we told him or her. You need to be careful, you know. Our client is waiting there, and this lady, Ms. Selena Acevedo, goes over and beats her up.

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09:22AM25

So we're not making a claim under TCPA at

09:27AM 1 property damage, which oftentimes in negligence cases and
09:27AM 2 premises cases, it's part of it. We just can't pick and
09:27AM 3 choose just based on what they're saying.

09:27AM 4 And again, I emphasize to the Court we're
09:27AM 5 not reciting -- we're not -- our lawsuit is not based on the
09:27AM 6 TCPA. And, in fact, if they wanted to make -- I don't know
09:28AM 7 if there's any case law that says, first of all, it's there
09:28AM 8 to protect the public. Well, they didn't protect my client.
09:28AM 9 It's there to protect for them not to tell somebody else what
09:28AM10 they're doing. Whataburger should not have told anyone. And
09:28AM11 that's one of the primary reasons and purpose of the statute.
09:28AM12 And that's all I have to say, Your Honor.

09:28AM13 And, yes, they are only making a limited
09:28AM14 request for the property damage. And the only thing I say is
09:28AM15 that not to award attorney's fees.

09:28AM16 **THE COURT:** Okay. So I think if the Court
09:28AM17 ends up finding that the motion to dismiss has merit, I don't
09:28AM18 think that I have a choice. I think the statute says
09:28AM19 "shall." But I'm not there yet.

09:28AM20 **MR. GARCIA:** I understand. I read it
09:28AM21 earlier, and it said "may," Your Honor.

09:29AM22 **MR. DURAN:** It's "shall," Your Honor. And
09:29AM23 then there's a separate section on sanctions for the improper
09:29AM24 filing, which the Court does have discretion. But the
09:29AM25 attorney's fees are not discretionary.

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